No. 81230-6

SANDERS, J. (dissenting)—The majority holds the trial court did not err in several evidentiary rulings. Majority at 1. I disagree.

The trial court erred by admitting evidence Bryan Duncan refused to submit to a psychological examination during discovery. The majority correctly notes we have previously held a detainee in a sexually violent predator petition action cannot be compelled to submit to an examination under CR 35. Majority at 5; *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). But the majority affirms the trial court, which informed the jury Duncan did not want to be reevaluated and allowed Dr. Leslie Rawlings to testify he would have liked to reexamine Duncan but was unable to do so. Majority at 7-8.

Since Duncan could not be ordered to submit to an evaluation per *Williams*, allowing evidence of Duncan's refusal was irrelevant and prejudicial. 147 Wn.2d at 491. The trial judge reasoned that because the case had dragged on for years and Duncan asked Dr. Rawlings whether he relied on hearsay information for his diagnosis because he had not performed an examination on Duncan since his initial evaluation in

1996, "fairness" entitled the State to show it was not "inept or incompetent or lazy . . . ." Verbatim Report of Proceedings (RP) (Nov. 3 2005) at 1340. The judge reasoned:

> So I think in fairness to the state and – and the defense has raised a point that this was all based on hearsay reports, which they need to do. . . . But I think that we get closer to the truth by frankly putting it out there and let the jury decide, and they're entitled to know that this professional's opportunity to have a subsequent interview was denied.

Id. This reasoning is highly questionable because the testimony is irrelevant and prejudicial. Dr. Rawlings is not the one on trial here, nor is the State. Rather, it is Duncan's liberty on the line. The reason Duncan did not have a more recent examination with Dr. Rawlings is irrelevant because it did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. But nonetheless the State was allowed to show it was not Dr. Rawlings's inability to perform another examination but rather Duncan's refusal to submit to another examination, his right under *Williams*, that forced Dr. Rawlings to rely on hearsay. 147 Wn.2d at 491. This evidence did not make Dr. Rawlings's testimony more credible but did make Duncan out as an obstructionist.

The majority admits, "it is possible to view these exchanges as having some prejudicial effect on Duncan." Majority at 8. It essentially renders Duncan's right to refuse an evaluation under *Williams* meaningless by affirming the trial judge's ruling. 147 Wn.2d at 491; majority at 8.

The trial court also erred by admitting evidence of a proposed roommate's criminal sexual history while excluding evidence that he had not reoffended since his release. The majority finds this "troubling" but nonetheless concludes, "the court's decision to limit the testimony was reasonable and that there was no abuse of discretion." Majority at 8-9, 12. I find this more than merely troubling. If it was relevant to show the proposed roommate's sexual history, it was just as relevant to show his conduct in the community. "All relevant evidence is admissible," ER 402, and the trial court has no discretion to disallow it except under ER 403, which is not at issue here.

Proceedings for the indeterminate commitment of convicted sex offenders "whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment, as we held in *Baxstrom v. Herold*, 383 U.S. 107[, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966),] and to the Due Process Clause." *Specht v. Patterson*, 386 U.S. 605, 608, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). Due process requires that the person "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, and have a right to cross-examine and to offer evidence of his own . . . ." *Id*. at 610.

Despite allowing the State to elicit testimony regarding Dion Walls's past criminal history, the trial court refused to allow Duncan to admit evidence Walls had not reoffended since being released back into the community. The State argued the

criminal history of Walls is highly probative because it tended to prove Duncan's likelihood to reoffend and corroborated Dr. Rawlings's diagnosis of Duncan. That reasoning is vastly suspect, as again, it is Duncan who is on trial, not Walls. Still, if the trial court admitted this evidence, arguably unfairly prejudicial, there is no reason why Duncan should be denied the opportunity to show Walls was a juvenile offender who has since stayed clean. The trial court should have at least allowed the testimony that Walls had not reoffended and was being successful in the community. Rather, the jury was simply left with the testimony that he was a sex offender, allowing the State to argue, "if your plan is to go live with another person who has a history of molesting children that's a big aggravating risk factor." RP (Nov. 9, 2005) at 1812. A trial court does not have discretion to limit relevant evidence simply because it wants to do so. ER 402.

The State was able to dub Walls "a child molester" and highlight his relationship with Duncan without any mitigating information about Walls's postrelease behavior. This had a strong effect on the jury, which concentrated many of its questions for Duncan on Walls's history. The State also used Walls's history as a sex offender repeatedly in closing argument, amplifying the prejudice. When jurors asked Duncan about his intention to move in with Walls and what he would do if he discovered Walls was sexually molesting children in the apartment they shared, Duncan answered that he would leave immediately and call the police.

Evidence may be unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action. *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). Evidence of Walls's criminal history was unfairly prejudicial because Duncan was not able to respond to it and offer evidence of Walls's behavior now. In essence, Duncan's due process rights were violated because he was not permitted to offer his own evidence about Walls nor could he examine Dr. Robert Wollert regarding Walls. The trial court abused its discretion when it did not allow evidence that Walls had not reoffended since his release and that he was successful in the community.

The trial court violated Duncan's rights, to his prejudice, in these two evidentiary rulings. I would reverse the Court of Appeals and remand for a new trial.

Accordingly, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: